



STATE OF INDIANA

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Joint Guidelines of the Securities Division and Department of Financial Institutions on Determination of Agency to Regulate Mortgage Professionals Issued in Compliance with § 37 of HEA 1359

September 1, 2008

As required by § 37 of HEA 1359 (P.L. 145-2008), the Securities Commissioner and the Director of the Department of Financial Institutions issue the following guidelines addressing the appropriate agency to oversee the regulation of certain persons within the mortgage industry.

1. Question:

What mortgage professionals are regulated by the Securities Division of the Indiana Secretary of State's office (the "Securities Division")?

Answer:

Under IC 23-2-5, the Securities Division licenses and regulates loan brokers. The Securities Division also registers loan originators and principal managers who work on behalf of the licensed loan brokers.

2. Question:

What is a loan broker?

Answer:

A "loan broker" means any person who, in return for any consideration from any source procures, attempts to procure, or assists in procuring, a loan from a third party or any other person, whether or not the person seeking the loan actually obtains the loan. IC 23-2-5-3(d).

3. Question:

Who is excluded from the definition of loan broker?

Answer:

The term "loan broker" does not include:

- (1) any supervised financial organization (as defined in IC 24-4.5-1-301(20)), including a bank, savings bank, trust company, savings association, or credit union;
- (2) any other financial institution that is:
 - (A) regulated by any agency of the United States or any state; and
 - (B) regularly actively engaged in the business of making consumer loans that are not secured by real estate or taking assignment of consumer sales contracts that are not secured by real estate;

- (3) any insurance company;
- (4) any person arranging financing for the sale of the person's product; or
- (5) a creditor that is licensed under IC 24-4.4-2-402.

4. Question:

What mortgage professionals are regulated by the Department of Financial Institutions (the "Department")?

Answer:

There are two types of licenses issued by the Department for persons engaged in mortgage lending:

First, under the First Lien Mortgage Lending Act ("FLMLA") (effective on January 1, 2009), a person who is regularly engaged in Indiana as a creditor in first lien mortgage transactions, *and* who is funding the loan with its own assets or its own established line of credit, must first obtain a license from the Department. IC 24-4.4-2-401. This person is referred to as a "mortgage lender" throughout this document.

Second, under the Uniform Consumer Credit Code ("UCCC"), a person who is regularly engaged in Indiana in making consumer loans, taking assignments of consumer loans or undertaking direct collection of payments from, or enforcement of rights against, debtors arising from consumer loans, must first obtain a license from the Department. Second lien mortgage loans are included in the definition of a "consumer loan" under the UCCC.

If a person is regularly engaged as a lender for both first and second lien mortgage loans, it is required to be licensed by the Department under both the FLMLA and the UCCC.

5. Question:

What is the difference between a loan broker, licensed by the Securities Division, and a mortgage lender, licensed by the Department?

Answer:

With respect to first lien mortgage transactions¹, the key difference between a loan broker and a mortgage lender is that the mortgage lender is the named creditor on the loan *and* funds the loan through the use of lender's own funds or established line of credit. A loan broker may or may not close the loan in its name but does not provide the funding from its own funds or its own established line of credit.

¹ Note that a person regularly engaged as the named creditor in a second lien mortgage transaction must be licensed under the UCCC, regardless of the funding source of the loan. The Department contemplates seeking a legislative amendment to the UCCC in the 2009 session to incorporate the "tablefunded" definition (see 6. above) currently included in the First Lien Mortgage Lending Act.

6. **Question:**

What is a tablefunded transaction?

Answer:

"Tablefunded" means a transaction in which:

- (a) a person closes a first lien mortgage transaction in the person's own name as a mortgagee with funds provided by one (1) or more other persons; and
- (b) the transaction is assigned simultaneously to the mortgage lender providing the funding not later than one (1) business day after the funding of the transaction. IC 24-4.4-1-301 (13)

7. **Question:**

Who regulates persons that tablefund all of their loans?

Answer:

The FLMLA specifically excludes tablefunding from the definition of "creditor" (IC 24-4.4-1-301(13)) which means that the Department does not require mortgage companies that exclusively tablefund loans to be licensed. It is the interpretation of the Securities Division that tablefunding is part of the loan brokerage business and, therefore, covered by the Indiana Loan Broker Act. Any person that exclusively tablefunds loans must be licensed by the Securities Division to be able to do business in Indiana.

8. **Question:**

Does the fact that the loan broker is approved by HUD, VA, FHLMA, or FNMA eliminate the need to obtain a license under the Loan Broker Act or the FLMLA?

Answer:

No, these exemptions are not included in the FLMLA, and all of these exemptions, previously included in the Indiana Loan Broker Act (IC 23-2-5-19(a)(8)), have been repealed.

9. **Question:**

If a person does a combination of loan brokering and mortgage lending, who is its regulator?

Answer:

A license issued by the Department is required under the FLMLA if a creditor is regularly engaged as a mortgage lender (a named creditor who funds the loan with its own funds or its own established line of credit) in first lien mortgage transactions in Indiana. The creditor is regularly engaged if:

- (a) the person acts as a creditor in first lien mortgage transactions in Indiana more than five (5) times in the preceding calendar year; or
- (b) the person did not meet the numerical standards set forth in subdivision (a) in the preceding calendar year, but has or will meet the numerical standards set forth in subdivision (a) in the current calendar year. IC 24-4.4-1-301 (10).

Therefore, if a person acts as a mortgage lender under the FLMLA on more than five consumer purpose first lien mortgage transactions in a calendar year, it will be licensed and regulated by

the Department. The Indiana Loan Broker Act exempts any person licensed by the Department under IC 24-4.4-2-402 from the definition of a loan broker.

10. Question:

If a person acts as a mortgage lender under the FLMLA for fewer than five first lien mortgage transactions in a calendar year and tablefunds the remainder, who will be its regulator?

Answer:

If the person acts as mortgage lender under the FLMLA on fewer than five consumer purpose first lien mortgage transactions in a calendar year, it is not considered to be regularly engaged in first lien mortgage transactions in Indiana and is not required to be licensed by the Department. If the person is not licensed by the Department, it will be required to obtain a license with the Securities Division because of its tablefunding activity.

11. Question:

If a person is licensed with the Department, but still tablefunds or brokers some of its loan, which agency will regulate those tablefunded transactions?

Answer:

In cooperation with the Securities Division, as necessary, the Department will regulate those activities consistent with its licensing, examination, and investigative authority.²

12. Question:

If a person is licensed as a loan broker with the Securities Division, but also engages in mortgage lending activities (but not enough to require a license with the Department), who will regulate those mortgage lending activities?

Answer:

The Securities Division, in cooperation with the Department as necessary, will have jurisdiction over mortgage lending activities through its authority to deny, revoke, or suspend a license for dishonest or unethical practices.³

13. Question:

Where can I find more information regarding the licensing and regulation of loan brokers and mortgage lenders?

Answer:

Additional information is available at the Web sites of the Securities Division and the Department, at <http://www.in.gov/sos/securities/loanBroker/LBInfoWP.htm> and <http://www.in.gov/dfi/2673.htm>, respectively.

² The Department and the Securities Division might seek amendments to IC 24-4.4-5 *et al.* and IC 23-2-5 *et al.* during the 2009 legislative session to clarify this cooperative regulatory authority.

³ See note 2. above.

**Recommendations for Legislation Needed to Implement Regulation of the Persons
Described Above:**

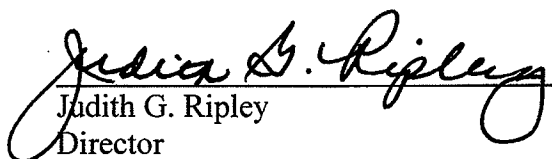
Footnotes to this guidance include some potential legislative issues to be addressed in the 2009 General Session. Additionally, and significantly, on July 30, 2008, the President signed into law the SAFE Mortgage Licensing Act. This act will require 2009 amendments to mortgage licensing authority for both the Department and the Securities Division. As noted above, effective January 1, 2009, the Department will assume regulation of first mortgage lenders. The SAFE Act compels states to enact legislation that requires state mortgage regulators to ensure that individual loan originators meet licensing standards (education, testing, and background checks), and that the mortgage companies, through their loan originators, follow applicable state and federal laws and regulations. The SAFE Act provisions require states to not only regulate non-depository mortgage lenders, but also to license each individual mortgage loan originator. This is a significant departure from the Department's current regulatory scheme. The effect on the Securities Division will be less significant as it already registers individuals, and have in place education requirements, testing, and background checks.

**INDIANA SECRETARY OF STATE
SECURITIES DIVISION**



Chris Naylor
Securities Commissioner

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS


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